IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

FAO No. 422 of 2005.

Judgment reserved on: 05-09-2006.

Date of Decision: 12th Sept. 2006.

Smt.Urmila Devi ..Appellant.

Versus.

Shri Narinder Singh ..Respondent.

Coram:

The Hon'ble Mr. Justice Deepak Gupta, Judge.

Whether approved for Reporting? Yes

For the Appellant:	**Mr.Bhupender Gupta, Senior Advocate assisted by Mr.Janesh Gupta and Ms.Charu Gupta, Advocates.**
For the Respondent:	**Mr.Kuldip Singh, Senior Advocate assisted by Mr.Karan Singh Kanwar, Advocate.**

Deepak Gupta, J.

This appeal by the wife is directed against the judgment of the learned District Judge, Shimla whereby he has allowed the petition of the husband and annulled the marriage of the parties under Section 12 of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act).

The facts necessary for disposal of the case are that the parties who are Hindus were married on 25th November, 2001. According to the husband the marriage between the parties was not consummated due to impotence of the wife. It is also the allegation of the husband that his consent for marriage was obtained by the wife and her family by fraud and material concealment of fact. According to the husband though the wife was about 31 years old when they got married she did

not before her marriage disclose to her husband or his family members that she had not attained menarche and has never had menses. Further the wife was not having a uterus and one ovary was missing and these facts were known to her but the husband was kept in the dark and his consent for marriage was obtained by concealing material facts.

The wife admitted the factum of marriage but denied the allegations that the marriage has not been consummated. According to her no fraud has been committed on the husband.

The parties led evidence and the learned trial Court held that the marriage between the parties had not been consummated because of the impotence of the wife. The trial Court also held that material facts were withheld from the husband at the time of marriage and that a fraud was played upon the husband while obtaining his consent for marriage. He accordingly allowed the petition and annulled the marriage. Hence, the present appeal.

I have heard Sh.Bhupinder Gupta, learned Senior Advocate appearing on behalf of the wife and Sh.Kuldip Singh, learned Senior Advocate appearing on behalf of the husband.

The main contention of Sh.Bhupinder Gupta is that there is nothing on record to show that the wife is impotent and therefore the marriage could not have been annulled under Section 12(a) of the Act. He further submits that even if it be presumed that the wife is suffering from certain physical defects, the said defects are curable and at best what can be said is that the wife is sterile but it cannot be said that she is impotent. He also submits that no fraud has been committed on the husband. According to him the version of the husband cannot be believed since he continued to live with the wife for about two months

after the marriage without any murmur or voice of dissent. He also submits that the husband has led no evidence to show that any inquiry was made from the wife or her family members about state of her health prior to the marriage.

On the other hand Sh.Kuldip Singh submits that this is a clear case of fraud since the wife has withheld a material fact that she is suffering from major disorder inasmuch as menstruation had never occurred. According to him the wife was under treatment and neither she nor her family disclosed to the husband that she had never had menses and if this fact had been disclosed the husband would never have got married to her. He also submits that impotency need not always be physical but may be psychological and according to him the husband's version is true and judgment and decree of the learned trial Court should be upheld.

I need not deal with the evidence in detail. The admitted facts are that the parties were married on 25th November, 2001. Till about the first or second of December admittedly they had no occasion to have sexual intercourse. It is also the admitted case of both the parties that during the month of December, 2001 the wife visited her parental house a number of times, though there is some dispute with regard to the number of days she spent on each visit. Though in her reply the wife has denied the fact that she was ever checked by a gynaecologist, in her statement in Court on oath she has admitted that on 7th January, 2002 she was taken by the husband's sister-in-law to the Kamla Nehru Hospital, Shimla and she was got medically checked from a gynaecologist.

The gynaecologist Dr.Sonia appeared in the Court as PW-1. According to her the wife was suffering with primary amenorrhea.

This is a condition in which menstruation has never occurred. The doctor states that the wife had not attained menarche. According to the doctor on examination she found that the wife was of short stature, had no auxiliary hair, pubic hair were scanty and the breasts were also not fully developed. The vagina admitted one finger only. The doctor then referred to the past history and stated that the wife had a history of 'caries spine' and that the wife had been taking 'ATT' for 3 years. The doctor also states that there was history of hemiplegia in the past. The doctor also stated that on the basis of the record of previous examination of uterus as conducted at DDU hospital Shimla where the ultra-sound of the wife was also done she was of the opinion that the uterus was very small. The doctor however was came to the conclusion that the wife was capable of sexual intercourse and may have conceived a child with treatment. According to the doctor the wife was potent and capable of sexual intercourse. The doctor in her statement has categorically stated that as per the history supplied to her the wife had never had menstruation except once on being administered medicines. She also stated that in normal woman the Barr body test should be positive.

Mr.Bhupinder Gupta has argued that there is no proof as to who gave the previous history to the doctor. In my opinion the history could have been given by the wife herself alone and not by anybody else. Assuming that the history was given by somebody else, the same must have been recorded by the doctor in the presence of the patient i.e. the wife and in case something wrong was being stated the wife could have raised an objection. In fact when the doctor was cross examined no suggestion was put to her on behalf of the wife that the history recorded by the doctor was not correct. The evidence

of the doctor reveals that the wife had suffered from caries spine i.e. tuberculosis of the spine and had been administered anti tubercolor treatment (ATT) for 3 years. She also had a history of hemiplegia which means total paralysis of one half of the body. It is thus clear that prior to her being shown to the gynaecologist on 7th January, 2002 the wife had been undergoing major treatment for tuberculosis of the spine and paralysis. It is also obvious that X-ray and sonography of the wife had been conducted earlier. No doubt, there is no cogent or reliable evidence to show as to when this sonography and X-ray was done. This was a fact which was definitely in the knowledge of the wife. The wife in her written statement had totally denied that she was ever medically checked up by the gynaecologist. She however admitted this fact in her statement in Court. In Court she also stated that prior to 7th January, 2002 and thereafter she has never got herself checked up from any doctor. This statement is patently false because it is apparent that in the history recorded by Dr.Sonia the wife had mentioned that she had been earlier examined by a doctor. She had also told the doctor that after she was administered medicines she had once had a scanty period (menses). It is also apparent that she had suffered from hemiplegia in the past. Both tuberculosis and hemiplegia are major diseases. During the course of treatment of such diseases the wife must have been medically examined by the doctors and that is why the ultrasound had been conducted which depicted that her uterus was very small and one ovary was missing.

From the facts mentioned above it can be said without fear of contradiction that the wife and her mother at least would have known about these problems. Assuming for the sake of argument that the

wife was unaware that one ovary was missing or that her uterus was small, it is more than obvious that she knew that she had never menstruated. She was 31 years old. She must have discussed this aspect with her mother. Even a simple village girl is aware about the fact that she has to menstruate. These are the matters discussed amongst women even in a conservative rural society. Moreover as discussed above in the present case the wife had undergone major treatment and ultra sound of her uterus had been done earlier. The wife was aged 31 years must have known about the findings of the ultra sound and it cannot be believed that she was totally unaware about any problem.

The question that arises for consideration is whether withholding of aforesaid facts amount to fraud as envisaged in Section 12 of the Act. According to Sh.Bhupinder Gupta, there is no evidence to show that the husband or his family members ever asked the wife or her family members whether she had any such problem. This contention cannot be accepted. In the society we live in, asking of such a question would be offensive to the other side. When talks for arranging a marriage are going on no one asks whether the boy or girl is impotent or not. Similarly no question can be asked whether the girl has attained menarche and is having regular menses or not.

Procreation of children is one of the major reasons for the solemnization of marriage recognized in our society. It is not only the companionship which one looks forward to in a marriage. Normally both husband and wife when they get married expect to have children and live as a happy family.

The husband has sought annulment of marriage on the grounds available under Sections 12(1)(a) and 12(1)(c) of the Act which read as follows:

> **"12.Voidable marriages—**(1) Any marriage solemnized, whether before or after the commencement of this Act, shall be avoidable and may be annulled by a decree of nullity on any of the following grounds, namely:
> (a)that the marriage has not been consummated owing to the impotence of the respondent; or
> (b)----------
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> (c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner was required under section 5, as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1979, the consent of such guardian was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent."

The first question which arises for consideration is whether a case for annulment has been made out on the ground that the consent of the husband was obtained by fraud with regard to any material fact or circumstance concerning the wife. What is fraud within the meaning of Section 12(1)(c) of the Act has been the subject matter of a number of decisions. The meaning to be given to the word fraud in this section is different from the interpretation given to this word under the Contract Act. When negotiations of marriage are taking place there is talk between both sides. There may be some minor exaggerations. There may also be some concealment. It is only if the non-disclosure is of a material fact that it will amount to fraud. Concealment or mis-representation of every small fact may not be fraud sufficient to justify for annulment of marriage. In case any fact or

circumstance is concealed which is of such a nature that it shall materially interfere with happy marital life it will definitely be a material fact or circumstance. In my opinion, withholding of any such fact which if disclosed would have resulted in the husband not agreeing to the marriage is a material fact. In the present case if the wife had disclosed to the husband that she was not having menses or that she had earlier been administered medicines and thereafter had scanty menses the husband in all probability may not have agreed to get married.

The question as to what is fraud has been the subject matter of number of judicial decisions. In **P. vs. K., AIR 1982 Bombay 400,** a learned Judge of the Bombay High Court held that where the wife had concealed the fact of the pro-lapse of uterus which was known only to her it amounted to non-disclosure of material fact amounting to fraud.

In **P.J. Moore vs. Valsa, AIR 1992 Kerala 176,** a Division Bench of the Kerala High Court held as follows:

> "5.No doubt, the concept of fraud in the contract Act is of wide amplitude. Fraud, in relation to matrimonial causes, cannot be understood as including concealment of every fact which relates to marriage. It has to be borne in mind that at the time of negotiation or courtship, parties would try to project themselves in the best possible form. Some amount of exaggeration in representation is often experienced to make him or her acceptable to the other as a spouse. Mere concealment or over-statement of facts by itself does not invalidate a marriage. Hence contours of concept of fraud as widely envisaged in the Contract Act cannot be imported hook line and sinker to matrimonial proceedings.

> 8.If non-disclosure relates to a fact which has a material impact on one the very purposes of nubile alliance that may amount to fraud which vitiates the consent expressly or impliedly given by one party for the marriage. The question then is, whether vasectomy is such a material fact as to taint the consent for marriage due to its non-disclosure.
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> 10.One of the sublime objects of married life is to have off springs. This is not merely a traditional view, but an established truth which transcends ages and has universal acceptance. Motherhood is one of the cravings of a normal woman. No authority need be cited to support this philosophy. Parties enter into marriage alliance on the assumption that they would become father and mother in due course of time. If a person became incapable of procreation through act of a man such as a surgery, he is under a basic duty to disclose that fact to the other party who wishes to join him in the wed-lock. Non-disclosure of this vital information which goes to the root of married life amounts to fraud in matrimonial relationship. Consent, given by one spouse without knowledge of this basic defect in the other spouse, stands vitiated and tainted. It is open to the affected spouse to petition that his or her consent was wangled by fraud."

I am in respectful agreement with the observations made by the Kerala High Court.

The Delhi High Court in **Anurag Anand vs. Sunita Anand, AIR 1997 Delhi 94,** has held that where the income of the husband was shown much higher than it actually was it amounted to fraud. Similarly in **Saly Joseph vs. Baby Thomas, AIR 1999 Kerala 66,** where it was proved that the husband had misrepresented his income and educational qualifications it was held that the marriage was liable to be declared null and void.

In the present case I am of the considered opinion that the wife by not disclosing the fact that she had never had menses had

concealed a material fact from the husband and this amounted to fraud entitling the husband to annulment of marriage. In fact in the present case I am of the opinion that the wife was not only aware that she did not have menses but was also aware about the other physical defects detected by the Gynaecologist since she had been medically examined earlier but both in the written statement and in the statement in Court she made a totally false statement that she had never been examined earlier.

The next question which comes up for consideration is whether the marriage has not been consummated owing to the impotence of the wife. The law with regard to impotence has been very succinctly laid down by the apex Court in **Yuvraj Digvijay Singh vs. Yuvrani Pratap Kumari, AIR 1970 SC 137,** wherein the Apex Court held that a party is impotent if his or her mental or physical condition makes consummation of marriage a practical impossibility.

Mr.Bhupinder Gupta, learned senior counsel has relied upon a number of authorities reported in **Mst.Shewanti Bhaurao Dongre vs. Bhaurao Daulatrao Dongre, AIR 1971 MP 168, Samar Som vs. Sm. Sadhana Som, AIR 1975 Calcutta 413, Rajendar Pershad Bhardwaj vs.Smt.Shanti Devi, AIR 1978 Punjab and Haryana 181, Harprasad Santore vs. Anita Santore, 1(1993) DMC 27, V.Shankar Ram vs.Mrs.Sukanya, AIR 1997 Madras 394.**

I need not refer to all the judgments in detail. The basic principle laid down in these judgments is that mere physical deformity in the genitals or sterility of the woman or inability of the woman to bear a child does not amount to impotence. Impotency is incapacity for sexual intercourse or when coitus is either impossible or very painful.

As the law stands today under Section 12(1)(a) of the Act a party seeking annulment of the marriage has to prove that the marriage has not been consummated owing to the impotence of the other party. The first question to be decided is whether the consummation has taken place. If it is found that consummation has not taken place then the second question to be decided is whether it is due to the impotence on the part of the wife.

In the present case the husband in his statement before the Court has stated the facts in great detail. He has stated that in the first 5-6 days of the marriage due to presence of relatives he did not have any chance to have sexual intercourse with the wife. Thereafter, according to him he made a number of attempts to have sex with his wife. As per his version though he attempted to have sex the wife was cold and did not respond. He states that though he kissed the wife he could not actually indulge in and enjoy the act of sex. On the other hand according to the wife the marriage was consummated. The fact whether a marriage was consummated or not is a fact which can be deposed to only by the husband and the wife. There can be no other person who can depose with regard to this fact. The statements of both the husband and wife have now to be examined in the light of the other material on record. The parties stayed together only for about six weeks. Out of this in the first week there was no chance to have sex. The wife also went to her parental home a number of times. According to the husband he had complained to his father-in-law in the end of December that the marriage had not been consummated due to the attitude of the wife. On 7th January, 2002 barely six weeks after the marriage which took place on 25th November, 2001 the wife

was got checked up from the hospital. After the check up the parties have never lived together.

The wife as observed above has not told the truth in the Court. In her written statement she went to the extent of stating that she had never been medically examined on 7th January, 2002. After the statement of the doctor she in the Court admitted that her medical examination had taken place. According to the wife she had never been medically examined either prior to or after the said date. This statement has also been found to be false. Therefore, in my opinion much reliance cannot be placed on the statement of the wife. The father of the wife was never examined by her. He could have admitted or denied whether the husband had in fact complained to him about non-consummation of the marriage or not.

The statement of the husband inspires confidence and his version appears to be more probable in view of the fact that the marriage lasted just about six weeks and ended immediately after medical examination. The petition for annulment was also filed on 25.3.2002 i.e. within four months of the marriage.

With regard to the impotence in my view even as stated by the Apex court in **Yuvraj Digvijay Singh's** case (supra) impotence can be both physical or psychological. The doctor in this case has clearly stated that the wife is not impotent therefore in physical terms it cannot be held that the wife was impotent. However, impotence may be psychological. Impotence is the incapacity to consummate the marriage for physical or psychological reasons. Therefore, a mental defect or mental block which precludes the consummation of marriage is as much a ground for annulment as a physical shortcoming. The mere absence of a physical or anatomical defect is not reason

enough to hold that the marriage cannot be dissolved. In case it is proved that sexual life is virtually impossible due to some mental apathy which is likely to be permanent the court must annul the marriage. The Court dealing with such question has to take a practicable and reasonable view on the basis of the evidence led before it.

In the present case the husband in my view has proved beyond doubt that the attitude of the wife towards sex is cold and repugnant. Therefore, I am of the opinion that she is psychologically impotent and the marriage has not been consummated due to this reason.

In view of the above discussion the appeal is without any merit and the same is dismissed with no order as to costs.

September 12, 2006. **(Deepak Gupta),**
PV **Judge.**